U.S. Department of Labor

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Issue Date: 23 May 2007

Case No.: 2005-BLA-06067

In the Matter of

K.H.
Claimant

v.

JOE SLUSHER TRUCKING
Employer

and

TRAVELERS INSURANCE COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Edmond Collett, Esquire
For Claimant

Lois A. Kitts, Esquire
For Employer

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER
DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

ISSUES

The following issues are presented for adjudication:

1. Whether the Miner filed a timely claim for benefits;

2. Whether the Miner has pneumoconiosis;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner is totally disabled;

5. Whether the Miner's disability is due to pneumoconiosis; and

6. Whether Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

(DX46; Tr. at 11).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

The Claimant filed an application for benefits on June 22, 1993. Administrative Law Judge Levin issued a Decision and Order – Denying Benefits on September 13, 1995. The Benefits Review Board affirmed Judge Levin's opinion on April 23, 1996. (DX1A). On June 25,

[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations.

2001, the Claimant filed a subsequent claim for benefits. (DX1). The District Director denied this claim on February 3, 2003, where he found that Claimant did not suffer from pneumoconiosis, that pneumoconiosis did not arise from coal mine employment, Claimant was not totally disabled due to a pulmonary impairment, and that total disability was not due to pneumoconiosis. (DX38).

The Claimant filed a timely request for a hearing on February 5, 2003, (DX39), and his claim was referred to the Office of Administrative Law Judges on April 24, 2003. (DX46). The claim was remanded to the District Director in order for him to provide a copy of the prior claim. On May 16, 2005, the District Director provided the prior claim file. (DX47). The claim was returned to the Office of Administrative Law Judges on July 7, 2005, (DX48), and assigned to me on April 17, 2006.

A formal hearing was held before me in London, Kentucky on September 19, 2006.[2] At that time, all parties were afforded full opportunity to present evidence and argument as provided in the Act and the regulations.[3] Following the formal hearing, the record was left open for thirty days for Employer to submit additional evidence. (Tr. at 8-9).

B. Factual Background

Claimant was born on April 5, 1939 and has an eighth grade education level. (DX1; Tr. at 12). The parties stipulated that Claimant has one dependent for the purposes of possible benefit augmentation under the Act, his wife, E.A., whom he married on September 30, 1959. (DX1; DX9; Tr. at 12). Claimant testified at the hearing that while working for Employer, he worked above ground as a truck driver hauling, loading, and unloading coal. Further, he testified that while he worked in the coal industry, he was continually exposed to dust in the cab of the truck he was operating. (Tr. at 13-15). Claimant stated that he last worked for Employer on May 24, 1991. (DX1; Tr. at 16).

Claimant testified that he has had health problems related to breathing since that time. (Tr. at 16). Furthermore, he testified that his breathing problems have gotten worse. Claimant uses an inhaler to help with his breathing. (Tr. at 17). As to his symptoms, Claimant testified that he becomes out of breath when he walks and he does not believe he would be able to walk one hundred yards. In addition, he testified that his breathing problems are more pronounced when he is walking up stairs and he has to rest after climbing one flight. He also testified that he has trouble breathing at night and wakes up several times because of this. Furthermore, he has episodes of coughing and wheezing at night. (Tr. at 17-19).

[2] The transcript of the hearing consists of 28 pages and will be cited as "Tr. at --."

[3] Administrative Law Judge's exhibits 1, Employer's exhibits 1-5, and Director's exhibits 1A, and 1-50 are admitted into evidence at the hearing. (Tr. at 5-6, 9). The following abbreviations are used herein: "ALJX" refers to the Administrative Law Judge's Exhibits; "DX" refers to the Director's Exhibits; "CX" refers to the Claimant's Exhibits; and "EX" refers to the Employer's exhibits.

Claimant admitted smoking approximately one-half of a pack of cigarettes per day for approximately two years. (Tr. at 13).

C. Coal Mine Employment

The parties have stipulated to fourteen years of coal mine employment. (Tr. at 10). Accordingly, I find that Claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations for fourteen years.

D. Timeliness

Section 932(f) of the Act provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later:
>
> (1) a medical determination of total disability due to pneumoconiosis; or
>
> (2) March 1, 1978.

30 U.S.C. § 932(f).

According to the regulations in pertinent part,

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, which is later…
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However,…the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. § 725.308.

The Court of Appeals for the Sixth Circuit interpreted these provisions as follows:

> …The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled due to pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and pursuant to [*Sharondale v. Ross,* 42 F.3d 993 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits. …Medically supported claims, even if ultimately deemed "premature" because the weight of

> the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602, 608 (6th Cir. 2001) (Emphasis in original, footnote omitted).

The unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes],* Case No. 01-3043, 2002 WL 31205502 (6th Cir. October 2, 2002), suggests that although § 725.308 applies to duplicate claims, a medical report submitted in support of a claim that is denied for failure to establish one or more elements of entitlement is treated, "for legal purposes," as containing a misdiagnosis. *Slip. op*. at 7. The majority held, therefore, that such a report does not constitute a medical determination of total disability that had been communicated to the miner, and, therefore, it does not trigger the running of the statute of limitations. *Id.* However, the Board has held that *Duke* has no precedential value and *Kirk* is the controlling authority. *Bowling v. Whitaker Coal Corp.,* BRB Nos. 04-0651 BLA and 04-0651 BLA-A (Apr. 14, 2005) (unpub.). Accordingly, I must decide whether any physician's opinion that the Claimant was totally disabled by pneumoconiosis was communicated to the Claimant more than three years before he filed the current claim, i.e., before June 25, 1998, and if he did not return to the mines after receiving such an opinion, the I must dismiss the claim as untimely.

Employer argues that the present claim is untimely as a medical determination of total disability due to pneumoconiosis was communicated to the miner during his prior claim, filed more than three years before the present claim. (EB at 19). I have reviewed the entire record for evidence on this issue. The Claimant testified that he last worked in coal mine employment on May 24, 1991. (DX1; Tr. at 16). In response to cross-examination from the Employer asking the Claimant whether any physician advised him that he was totally disabled by coal workers' pneumoconiosis, the Claimant answered that he was examined by Dr. Baker on September 9, 1992; however he did not remember what he discussed with Dr. Baker. (Tr. at 23-24).

Turning to the medical report, Dr. Baker examined Claimant on September 9, 1992. (DX1A at 513). He diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, resting arterial hypoxemia, and bronchitis. (DX1A at 515). He checked a box on the form by the statement, "[t]he miner does have an occupational lung disease caused by coal mine employment…" In answer to the question whether the miner was "physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust free environment…," he checked "no," explaining as follows:

> Patient should have no further exposure to coal dust, rock dust, or similar noxious agents due to his coal workers' pneumoconiosis, chronic obstructive pulmonary disease, resting arterial hypoxemia, and bronchitis. He may have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions.

(DX1A at 516).

Nothing in the report indicates that Dr. Baker discussed his findings with the Claimant at the time of the examination, or that he sent his report to the Claimant. I find that the report, if communicated to the Claimant would satisfy the requirement of the statute and regulation to trigger the three-year time limit for filing a claim. However, the evidence is insufficient to establish that the report and its content were communicated to the Claimant. For this reason, I conclude that the Employer has failed to rebut the presumption that the claim was timely filed based on the presence on this report in the record. Accordingly, I find that the current claim is timely filed.

E. Subsequent Claim

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for a modification. § 725.309(d). Claimant's prior application was denied on September 13, 1995 where the Board upheld the Administrative Law Judge's finding that Claimant did not suffer from pneumoconiosis, that pneumoconiosis did not arise from coal mine employment, Claimant was not totally disabled due to a pulmonary impairment, and that total disability was not due to pneumoconiosis. (DX1A). Claimant's most recent application was filed on June 25, 2001, not within one year of the prior denial, so it cannot be construed as a modification proceeding pursuant to § 725.310(a). Therefore, according to § 725.309(d) this claim must be denied on the basis of the prior denial unless there has been a material change in condition.

Section 725.309(d) provides that a subsequent claim must be denied unless Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. § 725.309(d)(2). If Claimant establishes the existence of one of those conditions, he has demonstrated, as a matter of law, a material change. If he is successful in establishing a material change, then all of the record evidence must be reviewed to determine whether he is entitled to benefits.

F. Medical Evidence of Record

The factual summary of the medical evidence submitted and considered in Claimant's prior claim is hereby incorporated into this decision. Although I have reviewed the old evidence of record, I find that its wholesale persuasive value is severely diminished due to its age. The initial claim's record contains medical evidence dated August 24, 1990 through November 16, 1994. (DX-1A). The current claim's contains treatment records from Dr. Baker on April 23, 2000. (DX11). That report contains the oldest affirmative medical evidence received into the new record. As such, the old record evidence is six years older, at best, than the new record evidence.

The Sixth Circuit Court of Appeals has held that pneumoconiosis is a "*progressive* and degenerative disease." *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993) (emphasis added). Consequently, because of pneumoconiosis' progressive and irreversible nature, the

Benefits Review Board ("the Board") has held that it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Cranor v. Peabody Coal Co.,* 22 B.L.R. 1-1 (1999) (*en banc on recon*.); *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 1-149 (1989) (*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986); *see also Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984) (generally, it is proper to accord greater weight to the most recent X-ray studies of record); *Coleman v. Ramey Coal Co.,* 18 B.L.R. 1-9 (1993) (more weight may be accorded to the results of a recent ventilatory study over the results of an earlier study); *Schretroma v. Director, OWCP,* 18 B.L.R. 1-17 (1993) (more weight may be accorded to the results of a recent blood gas study over a study that was conducted earlier); *Bates v. Director, OWCP*, 7 B.L.R. 1-113 (1984) (more recent medical report of record entitled to more weight than reports dated eight years earlier). I find that the age difference between the old record evidence and the new record evidence is quite significant and severely compromises the reliability and persuasiveness of the old record evidence. Consequently, I accord the old record evidence, as a whole, significantly diminished weight.

G. Entitlement

Because this claim was filed after March 31, 1980, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) the total disability is caused by pneumoconiosis. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267 (1994); *see also* 20 C.F.R. §§ 718.201 – 718.204.

H. Elements of Entitlement

1. Presence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.

(1) *Clinical Pneumoconiosis.* "Clinical Pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary

fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and it sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§ 718.201.

Section 718.202(a), provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in §§ 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners who died on or before March 1, 1978), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion.

Absent contrary evidence, evidence relevant to either category may establish the existence of pneumoconiosis. In the face of conflicting evidence, "all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 25 (3rd Cir. 1997).

X-ray evidence, § 718.202(a)(1)

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations performed before January 19, 2001, are found at § 718.102 and Appendix A of Part 718. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may be classified as round (p, q, r) or irregular (s, t, u) and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B, or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. § 718.102(b).

Physician's qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the List of A- and B-readers issued by the National Institute of Occupational Safety and Health ("NIOSH").[4] If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: "A" refers to a NIOSH certified A-reader; "B" refers to a NIOSH certified B-reader; "BCR" refers to a physician board-certified in radiology. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram,* 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be board-certified radiologists.

The following table summarizes the x-ray findings available in the current record:

Ex. No.	Date of X-ray	Date of Reading	Physician	Qualifications	Film Quality	X-ray interpretation
DX11	3/23/01	3/23/01	Baker		n/a	1/0
DX31	3/23/01	9/27/02	Wiot	BCR	1	Negative
DX15	10/12/01	10/12/01	Hussain		1	Negative
DX31	10/12/01	9/27/02	Wiot	BCR	1	Negative
EX3	3/07/02	3/07/02	Broudy	B		0/1
DX47	10/15/03	10/15/03	Dahhan	B	1	Negative

It is well established that the interpretations of an x-ray by a B-reader may be given additional weight by the fact-finder. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32, 34 (1985); *Martin v. Director, OWCP*, 6 B.L.R. 1-535, 537 (1983); *Sharpless v. Califano*, 585 F.2d 664, 666-667 (4th Cir. 1978). The Benefits Review Board has also held that the interpretation of an x-ray by a physician who is a B-reader as well as a board-certified radiologist may be given more weight than that of a physician who is only a B-reader. *Scheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent x-ray evidence of record, but rather, the length of time between the x-ray studies and the qualifications of the interpreting physicians are factors to be considered. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Pruitt v. Director, OWCP*, 7 B.L.R. 1-544 (1984); *Gleza v. Ohio Mining Co.,* 2 B.L.R. 1-436 (1979).

The earliest film taken on March 23, 2001 was interpreted by Dr. Baker as positive with an ILO classification of 1/0. Dr. Wiot interpreted the film as negative and a film quality of one. Dr. Baker, who is board-certified in internal medicine and pulmonary medicine, has no radiological qualifications. Dr. Wiot is a board-certified radiologist. As Dr. Wiot is better qualified, I grant his interpretation more weight than Dr. Baker's. Consequently, I find that the March 23, 2001 x-ray does not establish pneumoconiosis.

[4] NIOSH is the federal government agency which certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as A-readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as B-readers after they have demonstrated expertise in interpreting x-rays for their existence of pneumoconiosis by passing an examination.

The film taken on October 12, 2001 was interpreted by Drs. Hussain and Wiot as negative with a film quality of one. Accordingly, I find that this x-ray does not establish the presence of pneumoconiosis.

The film taken on March 7, 2002 was interpreted by Dr. Broudy, a B-reader, as negative with an ILO classification of 0/1. Therefore, I find this x-ray does not establish the presence of pneumoconiosis.

The October 15, 2003 x-ray film was interpreted by Dr. Dahhan, a B-reader, as negative. Accordingly, I find this x-ray does not establish the presence of pneumoconiosis.

Considering all of the x-ray evidence together, I find that the weight of the x-ray evidence does not support a finding of pneumoconiosis.

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here as there is no such evidence in this case.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions are applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physician's opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

The record contains the following physician's opinion:

Dr. Dahhan

Dr. Dahhan is board-certified in internal medicine and pulmonary medicine. He examined Claimant on October 15, 2003 and prepared a report on October 30, 2003. Dr. Dahhan noted that Claimant is a non-smoker. In addition, Dr. Dahhan reported Claimant's coal mine employment history as fourteen years. His exam of the chest revealed clear lungs with no pleural or parenchymal abnormalities consistent with pneumoconiosis. Dr. Dahhan opined that Claimant is not inflicted with pneumoconiosis. His opinion is based on a chest x-ray, pulmonary function studies, arterial blood gas studies, physical examination, and review of Claimant's medical records. (DX47). After reviewing updated records, Dr. Dahhan submitted a supplemental report on August 30, 2006. Dr. Dahhan's conclusion that the evidence is insufficient to justify a diagnosis of pneumoconiosis remains unchanged. However, Dr. Dahhan testified that Claimant is inflicted with an obstructive impairment due to hyperactive airway disease or bronchial asthma. (DX47; EX4; EX5).

Dr. Hussain

Dr. Hussain, who is board-certified in internal medicine and pulmonary medicine, examined Claimant at the request of the Office of Workers' Compensation Programs on October 12, 2001. He diagnosed Claimant with chronic obstructive pulmonary disorder, however his reports indicates that he is unsure of the cause of this disorder, speculating tobacco abuse. He opined that Claimant's chronic obstructive pulmonary disorder was not caused by coal dust exposure. Dr. Hussain based this diagnosis on a chest x-ray, pulmonary function study, arterial blood gas study, and a physical examination. He noted that Claimant never smoked. (DX12).

Dr. Broudy

Dr. Broudy is board-certified in internal medicine and pulmonary medicine. He is also a certified B-reader for interpreting x-ray films. He examined Claimant on March 7, 2002. The examination consisted of obtaining Claimant's history, a physical examination, chest x-rays, a CT-scan, pulmonary function studies, and arterial blood gas studies. Dr. Broudy noted that Claimant reported that he never smoked. In addition, Dr. Broudy noted that Claimant had approximately seventeen years of coal mine employment history. Dr. Broudy found no evidence of pneumoconiosis, silicosis, or any chronic lung disease from exposure to coal mine dust. (EX1; EX2; EX3).

An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. *See Fields v. Island Creek Co.,* 10 B.L.R. 1-19 (1987); *Hess v. Clinchfield Coal Co.,* 7 B.L.R. 10295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 1-149 (1989) (en banc); *see also Duke v. Director, OWCP,* 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis).

Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the fact-finder. *See Clark*. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.,* 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP,* 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co.,* 11 B.L.R. 1-91, 1-94 (1988). *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984). The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP,* 7 B.L.R. 1-597, 1-599 (1984).

Accordingly, I give sufficient weight to the opinion of Drs. Broudy and Dahhan. I find Drs. Broudy and Dahhan's reasoning and explanation in support of their conclusions complete and thorough. Those two physicians explained how the evidence they developed and reviewed supported their conclusions. By contrast, Dr. Hussain opined that Claimant's chronic obstructive pulmonary disorder was not caused by exposure to coal dust. He finds this disorder without fully explaining what his opinion is based on. His report renders conclusions with no supporting rationale, which results in his report being less than well-reasoned and entitled to less weight.

Other Medical Evidence § 718.107

Pursuant to § 718.107, another way to establish the existence of pneumoconiosis is through the use of "the results of any medically acceptable test or procedure reported by a physician…which tends to demonstrate the presence or absence of pneumoconiosis, the sequaelae of pneumoconiosis or a respiratory or pulmonary impairment…" § 718.107(a). Further, under § 718.107(b), "the party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits."

The record contains the following "other medical evidence":

Dr. Broudy performed a CT scan of Claimant's chest on March 7, 2002. The doctor opined that the CT scan showed no evidence of pneumoconiosis. (EX3).

Treatment Records § 725.414(a)(4)

Pursuant to § 725.414(a)(4), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease may be received into evidence." A treating physician's report may be considered in weighing the medical evidence of record to determine "whether the miner suffers, or suffered, from pneumoconiosis…" § 718.104(d). The factors to consider in weighing the treating physician's opinion include the nature and duration of the patient/physician relationship and the frequency and extent of treatment. § 718.104(d)(1)-(4). However, a treating physician's opinion must be considered in light of all relevant evidence in the record.

Claimant was treated by Dr. Baker from April 23, 2000 until November 29, 2001. During that time, Dr. Baker diagnosed coal worker's pneumoconiosis and chronic pulmonary obstructive disease, based on physical examinations, chest x-rays, and pulmonary function studies. (DX11).

Although he is the treating physician, I find Dr. Baker's report to be outweighed by the contrary probative evidence, specifically the negative x-ray results and the better reasoned medical reports of Drs. Broudy and Dahhan. I find Dr. Baker's opinion to be undocumented. Accordingly, Dr. Baker's findings are not accepted under the provisions of § 718.104(d).

In sum, when viewed as a whole, I find that the evidence of record does not establish the presence of pneumoconiosis.

2. Pneumoconiosis Arising Out of Coal Mine Employment

The regulations provide that a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). However, where a miner has established less than ten years of coal mine employment history, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." § 718.203(c).

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a), Claimant cannot establish that the miner had pneumoconiosis arising out of coal mine employment pursuant to § 718.203. However, I note that Claimant established fourteen years of coal mine employment, and had I found a presence of the disease, Claimant would be entitled to the rebuttable presumption that pneumoconiosis arose out of coal mine employment.

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
>
> (ii) From engaging in gainful employment…in a mine or mines…

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); *see also, Beatty v. Danri Corp.,* 16 B.L.R. 1-1 (1991), *aff'd as Beatty v. Danri Corp. & Triangle Enterprises,* 49 F.3d 993 (3rd Cir. 1995).

Claimant may establish total disability in one of four ways: (1) pulmonary function study; (2) arterial blood gas study; (3) evidence or cor pulmonale with right-sided congestive heart failure; or (4) reasoned medical opinion. § 718.204(b)(2)(i)-(iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. (*Gee v. W.G. Moore & Sons,* 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. *Rafferty v. Jones & Laughlin Steel Corp.,* 9 B.L.R. 1-231 (1987).

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment is. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies are found at § 718.103 and Appendix B. The following chart summarizes the results of the pulmonary function studies available in this case. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. § 718.203(b)(2)(i).

The current record contains the pulmonary function studies summarized below:

Date	Ex. No.	Physician	HT.[5]/ AGE	FEV_1	FVC	MVV	EFFORT	QUALIFIES
8/17/01	DX11	Baker	66/62	1.11	1.98	n/a	Good	Yes
3/23/01	DX11	Baker	66/61	1.72	2.48	n/a	Poor	No
10/10/01	DX14	Hussain	65/62[6]	1.80 1.65*	2.59 2.74*	27	Good	No No*
3/7/02	EX3	Broudy	62.6/63	1.64 1.57*	2.28 2.32*	27 32*	Poor	No Yes*
10/15/03	DX47	Dahhan	65.4/64	1.16 1.33*	1.75 1.87*	23 26*	Good	Yes Yes*

*post-bronchodilator

[5] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP,* 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.,* 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the miner, I have taken the average height 65 in determining whether the studies qualify to show disability under the regulations.

[6] Dr. Hussain indicated on his report that Claimant was 63 years old. However, based on Claimant's birthday, April 5, 1939, I find that Claimant was 62 years old at the time of this study.

October 15, 2003 Pulmonary Function Study

The most recent study produced qualifying values under the regulations both pre-bronchodilator and post-bronchodilator. § 718.204(b)(2)(i). Dr. Dahhan is board-certified in internal medicine and pulmonary medicine. He also found Claimant's effort, cooperation, and comprehension all to be good. (DX47). Additionally, no evidence was submitted that challenged the validity of the test results. Therefore, I find that the October 15, 2003 pulmonary function test is valid.

March 7, 2002 Pulmonary Function Study

The study of March 7, 2002 produced values that were non-qualifying pre-bronchodilator and qualifying values post-bronchodilator under the regulations. § 718.204(b)(2)(i). Dr. Broudy noted that Claimant gave suboptimal effort, thus the results of the test are invalid. (EX3). Little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.,* 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP,* 6 B.L.R. 1-945 (1984). Accordingly, I find this study invalid.

October 10, 2001

This study produced values that were non-qualifying under the regulations. § 718.204(b)(2)(i). Dr. Hussain found Claimant's effort to be good. (DX14). Dr. Vuskovich reviewed the study and opined that it was not valid due to less than optimal effort and insufficient tracings. (DX47). However, I do not find Dr. Vuskovich's opinion to be persuasive. I note that Dr. Hussain was present during this testing and reported that the Claimant gave good effort. As Dr. Hussain was present during the testing and actually observed the Claimant's effort, I find that his opinion outweighs Dr. Vuskovich and I consider that study valid.

March 23, 2001 Pulmonary Function Study

This study produced values that were non-qualifying under the regulations. § 718.204(b)(2)(i). However, this study is not valid as Dr. Baker questioned Claimant's effort due to incomplete exhalation. (DX11). In addition, Dr. Vuskovich found the study to be invalid due to insufficient tracings. (DX47). Accordingly, I find this study to be invalid.

August 17, 2001 Pulmonary Function Study

The March 17, 2001 study produced values that were qualifying under the regulations. § 718.204(b)(2)(i). Dr. Baker found Claimant's effort to be good. (DX11). Dr. Vuskovich reviewed the study and opined that it was not valid due to less than optimal effort and insufficient tracings. (DX47). However, I do not find Dr. Vuskovich's opinion to be persuasive. I note that Dr. Baker was present during this testing and reported that the Claimant gave good effort. As Dr. Baker was present during the testing and actually observed the Claimant's effort, I find that his opinion outweighs Dr. Vuskovich and I consider that study valid. Accordingly, I find this study to be valid.

Since the valid qualifying studies outweigh the valid non-qualifying studies, I find the weight of the pulmonary function study evidence does support a finding of total disability pursuant to § 718.204(b)(2)(i).

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (pO2) and the percentage of carbon dioxide (pCO2) in the blood. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies are found at § 718.105. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. § 718.105(b).

The following chart summarizes the arterial blood gas studies available in this case:

Date	Ex. No.	Physician	pCO2	pO2	QUALIFIES
10/10/01	DX13	Hussain	44.1 41.8*	76.0 77.0*	No No*
3/7/02	EX3	Broudy	43.5	74.4	No
10/15/03	DX47	Dahhan	44.5 46.0*	75.2 78.1*	No No*

The blood gas studies did not yield qualifying results. Based on the foregoing, Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Cor pulmonale with Right-sided Congestive Heart Failure

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure in this case.

Medical Opinions

Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, *i.e.*, performing his usual coal mine work or comparable and gainful work. § 718.204(b)(2)(iv). With certain specified exceptions, the cause or causes of total disability must be established by means of a

physician's documented and reasoned report. § 718.204(c)(2). Quality standards for reports of physical examinations are found at § 718.104.

The record contains the following medical opinions relating to this case:

Dr. Broudy

Dr. Broudy opined that Claimant was not suffering from pneumoconiosis. Based on a physical exam, a pulmonary function test, an arterial blood gas study, and review of Claimant's medical records, Dr. Broudy opined that Claimant has a mild pulmonary impairment. However, from a pulmonary standpoint, Dr. Broudy reported that Claimant would be able to perform the work of a coal miner. He further opined that Claimant's impairment was not due to the inhalation of coal dust. (EX1; EX2; EX3).

Dr. Hussain

Dr. Hussain diagnosed Claimant with chronic obstructive pulmonary disease. He opined that Claimant had a mild pulmonary impairment which does not prevent him from performing his last coal mine job. Furthermore, Dr. Hussain opined that Claimant's pulmonary impairment, caused by chronic obstructive pulmonary disease was not caused by his coal mine employment. (DX12).

Dr. Dahhan

Dr. Dahhan opined that the physical examination, arterial blood gas studies, lung volumes, and chest x-rays revealed no evidence of a pulmonary impairment caused by the inhalation of coal dust. Dr. Dahhan found Claimant to be inflicted with a mild obstructive respiratory impairment. However, Dr. Dahhan opined that this impairment was not caused by exposure to coal dust or pneumoconiosis. Dr. Dahhan opined that this impairment was instead caused by asthma. In addition, he stated that Claimant retains the respiratory capacity to continue his previous coal mine work or comparable work. (DX47; EX4; EX5).

In the instant case, I find that the physician's opinions are well-documented and reasoned as they are clearly and logically based on clinical findings, such as physical examinations, pulmonary function tests, and arterial blood gas studies. All of the physician's opined that Claimant does not suffer from an impairment that would prevent him from working as a coal miner. Furthermore, although Dr. Hussain opined that Claimant is suffering from chronic obstructive pulmonary disease and Dr. Dahhan opined that Claimant is suffering from asthma, they both reported that the impairment is not significant enough to prevent Claimant from working in the capacity of a coal miner or similar employment.

Although the physician's opinions do not establish total disability, I find that weight of the objective pulmonary studies that do establish total disability outweigh the physician's opinions. Accordingly, I find total disability pursuant to § 718.204(b)(2)(i).

4. Total Disability Due to Pneumoconiosis

In order to be entitled to benefits, Claimant must also establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "[s]ubstantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. § 718.204(c); *Bonessa v. U.S. Steel Corp.,* 884 F.2d 726, 734 (3rd Cir. 1989).

The Benefits Review Board has held that § 718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. *Baumgardner v. Director, OWCP,* 11 B.L.R. 1-135 (1986). I find that the record does not establish that Claimant's impairment resulted from coal mine employment. A persuasive and reasoned explanation is not given as to why the Claimant's impairment was caused by coal mine employment.

Therefore, I find the evidence is insufficient to meet Claimant's burden of establishing that he is totally disabled due to coal worker's pneumoconiosis pursuant to § 718.204(c).

CONCLUSION

As Claimant has failed to establish any medical element of entitlement by the newly submitted evidence, the claim must be denied.

ATTORNEY'S FEE

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of this claim.

ORDER

The Claimant's claim for benefits under the Act is DENIED.

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RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).